Supreme Court, U.S.
FILED
JUL 6 2000
OFFICE OF THE CLERK

No. 99-1850

In The Supreme Court of the United States

SANDRA SLAYDON HAWES, ROBERT A. MUSCARELLA, MANOHAR B. KADAM, CAROLYN HOLDER,
***pro se*, on behalf of themselves and class of similarly situated persons,**

Petitioners

v.

JOHNSON & JOHNSON, et al,

Respondents

On Petition for Writ of Certiorari
to The United States Court of Appeals for the Third Circuit

PETITIONERS' REPY BRIEF

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QUESTIONS PRESENTED

Preface

An employer implemented a voluntary early retirement incentive plan (hereafter "VEREP"). Before the eligibility periods expired the positions of some of the individuals eligible for VEREP were eliminated. Petitioners and prospective class members compose that class of individuals. This class was given no option to remain employed. All remaining individuals had the option of remaining in their positions or retiring under that plan. The employer also eliminated the positions of *others*, not eligible for VEREP, these individuals qualified for severance benefits. Petitioners and prospective class members who qualified for VEREP also qualified for these same severance benefits. Petitioners and the prospective class were denied or required to chose between VEREP and their severance benefits. All petitioners and prospective class members are in the age-protected class; all have pension eligibility status.

This petition presents five questions to the Supreme Court, which collectively, constitutes an issue of first impression.

Question 1

Does ADEA, as amended by OWBPA, provide the controlling statutes for ERISA and all other employee benefit plans where benefits are applicable to age-protected individuals?

Question 2

Does implementing a voluntary early retirement incentive plan which does not provide age protected individuals an option of remaining employed, compel their retirement or otherwise violate 29 U.S.C. §621 *et seq*. If so, what is the remedy?

Question 3

Where individuals in the age-protected class have qualified for severance benefits on the same terms and conditions as other workers, does the Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.*, prohibit the reduction or denial of severance to those individuals except as expressly set forth by 29 U.S.C. §623 (f)(2)(B)(i) **or** (ii) **or** §623 (*l*)(2)(A)? If so, were the conditions set forth in any of these statutes satisfied by the defendants when implementing their VEREP and Severance plan(s)?

Question 4

Should the Court so find in Question 3 *supra*, the answers "yes" and "no" respectively, does an ERISA plan administrator or an employer violate 29 U.S.C. §621 *et seq.*, by action contrary to these controlling statutes where the ERISA severance benefit is applicable to age protected individuals? If so, does a Federal Court, in such circumstance, have discretion to deny the certification of an ERISA class when all other conditions for certification are met?

Question 5

Does the standard for liquidated damages, established as *stare decisis* by this Court in Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, (1985) apply in this case as a matter of law?

TABLE OF CONTENTS

I
THE ISSUES BEFORE THIS COURT ARE UNRELATED TO THE JURY'S FINDINGS ON AGE DISCRIMINATION
Page 1

II
THE COURTS BELOW APPLIED THE WRONG STANDARD OF REVEIW
Page 1

III
OWBPA MANDATES THAT AN EMPLOYEE BENEFIT PLAN BE AN AFFIRMATIVE DEFENSE
Page 3-4

IV
BENEFIT CLAIMS BY PENSION-ELIGIBLE EMPLOYEES ARE DETERMINED AS A MATTER OF LAW UPON EXAMINATION OF THE PLAN DOCUMENT
Page 4-5

V
A "MUTALLY EXCLUSIVE" DEFENSE AND A 29 U.S.C. §623 (*l*)(2)(A) "AFFIRMATIVE DEFENSE" ARE UNAVAILABLE TO RESPONDENTS IN THIS CASE
Page 5-7

VI
THE RIGHT TO VEREP VESTED INDEPENDENTLY OF THE RIGHT TO VESTED SEVERANCE BENEFITS
Page 7-8

VII
VEREP's "SERVICE BENEFIT" AND SEVERANCE BENEFITS ARE NOT FUNGIBLE
Page 8-9

TABLE OF CONTENTS
CONTINUED

VIII
RESPONDENTS USED A SUBTERFUGE IN RECKLESS DISREGARD OF ADEA's PURPOSES AND PROTECTIONS
Page 9

X
AGE RELATED EMPLOYEE BENEFIT CLAIMS ARE SERIOUS POLICY ISSUES THAT MUST BE ADDRESSED BY THE SUPREME COURT OF THE UNITED STATES
Page 9-10

TABLE OF AUTHORITIES

CASES PAGE NO.

DiBiase v. Smithkline Beecham Corp.,
48 F.3d 719 (3d Cir. 1995) ---------- 8

Equal Employment Opportunity Commission
v. Westinghouse Electric Corp.("Westinghouse II"), --------- 8
869 F.2d 696 3d Cir. 1989); vacated and remanded
for reconsideration under "Betts"

May v. Shuttle, Inc., 129 F.3d 165 (DC Cir. 1997) --------- 6, 7

Ohio Public Employees Retirement Sys. v. Betts,
492 U.S. 158 ("Betts"), ---------- 3

Oubre v. Entergy Operations, Inc.,
118 S. Ct. 838 (1998) ----------10

Trans World Airlines, Inc. v. Thurston,
469 U.S. 111 (1985) ---------- 8

UNITED STATES CODE CONGRESSIONAL
AND ADMINISTRATIVE NEWS ----------3, 4
101st Congress-Second Session, 1990, Volume 5
The Burden of Proof at 1535

I
THE ISSUES BEFORE THIS COURT ARE UNRELATED TO THE JURY'S FINDINGS ON AGE DISCRIMINATION

The jury's findings in this case are unrelated to the severance benefit claims before this Court. The issues presented here stem from summary judgement proceedings below.

The District Court granted Respondents partial summary judgement, on Petitioners' ERISA, ERISA Class and ADEA claims for severance benefits, Counts 1, 2 & 3, see Petition at 9-11, and citing to Appendix [1/]. Petitioners appealed; the 3rd Circuit Court of Appeals affirmed. The remaining counts involving claims of discrimination in terminations of employment based on age and other grounds were tried by a jury or dismissed. Those counts are not in issue here.

II
THE COURTS BELOW APPLIED THE WRONG STANDARD OF REVEIW

The District Court and the 3rd Circuit of Appeals both concluded that Petitioners had failed to establish a *prima facie* case of age discrimination. Therefore neither court deemed it necessary to address Petitioners' arguments on OWBPA's "safe harbors" or affirmative defenses.

Because this is a benefits discrimination case and not a typical age discrimination case, Petitioners submit the lower Courts applied the wrong standard of review at the threshold. This error then deprived Petitioners of the review to which they were entitled, namely whether they had been deprived of statutorily guaranteed protections and benefits. Respondents, once again, seek to perpetuate that erroneous standard of review before this court. See Brief in Opposition at 9,11,12,14, (hereafter "Br.").

[1/] See, APPENDIX SUPPLEMENT, hereafter, "Apps." which includes: Count 1, ERISA at Apps.152-159, Count 2, ERISA CLASS at Apps.159-162, Count 3, ADEA at Apps.162-165, The Release of all Claims of Robert A. Muscarella, UNSIGNED, dated: September 1, 1993 at Apps.166-167, (JA171-172), The Burden of Proof, at Apps.146-147.

III
OWBPA MANDATES THAT AN EMPLOYEE BENEFIT PLAN BE AN AFFIRMATIVE DEFENSE

Respondents argued, and the lower courts found, there is no need to reach affirmative defenses in this case because there is no age-adverse treatment and no *prima facie* case. Br.9, 10-12, 14, 15, and 16 See Opinions at App.15, App.30.

This legal analysis is wrong and stands the OWBPA on its head. Not only does an employer's affirmative defense need to be reached in an age-related benefit claim, it is the only defense to reach. ADEA, as amended by OWBPA mandates that an employee benefit plan be an affirmative defense. Petition at 32.

An affirmative defense is required, when challenged, to justify that any denial or reduction of a severance benefit does not discriminate on the basis of age. It is the only defense for a court of law to examine because severance plan benefit reductions are controlled statutorily and limited to the narrow exceptions that are provided in these three statutes, 29 U.S.C. §623 (f)(2)(i), (ii), or §623 (*l*)(2)(A). Petition at 4.

" Where an employer under an employee benefit plan provides the same level of benefits to older workers as to younger workers, there is no violation of section 4(a) [29 U.S.C. §623 (a)] and accordingly the practice does not have to be justified under section 4(f) [29 U.S.C. §623 (f)(2).]", (emphases added), 29 CFR 1625.10(a)(2) at App.139.

An employer who wants to reduce the level of severance benefits applicable to a pension eligible individual, must justify the lower level by using the narrow exceptions ("safe harbors") that are permitted under the Act and create a plan exception, **"....as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989)"**, as required by 29 U.S.C. §623 (f)(2)(emphasis added). Petition at 4.

Having created a benefit plan in compliance with the Act, an employer is then required **" to observe the terms of a bona fide plan"** and also **"...shall have the burden of proving that**

such actions are lawful....., as required by 29 U.S.C. §623 (f)(2). (emphasis added),This clear statutory intent is underscored by the legislative history of this provision. See: The Burden of Proof, 5 U.S. Code & Cong. Admin. News 1535 (101st Cong., 2nd Secession 1990) at Apps.145-147, hereafter, "Burden of Proof".

Thus the terms incorporated into any employee benefit plan become and are unavoidably an employer's affirmative defense. Congress intended it to be so, and enacted it into law.

This is the essence of an employer's affirmative defense.

An affirmative defense is absent from the Brief in Opposition, and Respondents reiterate their pleadings for the inverted rationale, *supra*, in this Court:

> Thus, there is no need to reach these affirmative defenses unless the challenged action otherwise would violate the ADEA, that is, that the action discriminates against the plaintiff on the basis of age. This was the structure of 29 U.S.C.§ 623 (f)(2) before the OWBPA amendments in 1990. *See Public Employees v. Betts,* 492 U.S. 158, 161, 165-66 (1989);.....As the regulation adopted in the OWBPA amendment to 29 U.S.C. §623 (f)(2) recognizes:
>
> "As [the] statutory text makes clear, the section 4(f)(2) exception [29 U.S.C.§ 623 (f)(2)] is limited to otherwise discriminatory actions.....", 29 CFR §1625.10(c). Br.11-12.

Notably, Respondents excised the remainder of the Code's requirement. Petitioners quote the regulation here: "As [the] statutory text makes clear, the section 4(f)(2) exception [29 U.S.C.§ 623 (f)(2)] is limited to otherwise discriminatory actions which are actually prescribed by the terms of a bona fide employee plan." (emphasis added), CFR §1625.10(c), App.140.

Respondents are required, but have failed, to assert an affirmative defense to justify their denial of severance plan benefits to VEREP *eliminated* individuals. Respondents are required, but have failed, to assert an affirmative defense that VEREP *eliminated* individuals retired voluntarily when there was no option for them to remain employed.

The Brief in Opposition ignores, "..[Respondents'] burden of proving that such actions are lawful", 29 U.S.C. §623 (f)(2), "Burden of Proof" at 1535.

This is the essence of Petitioners' Questions 2 and 3.

IV
BENEFIT CLAIMS BY PENSION-ELIGIBLE EMPLOYEES ARE DETERMINED AS A MATTER OF LAW UPON EXAMINATION OF THE PLAN DOCUMENTS

Respondents discuss "Severance Events" which "trigger" eligibility and disqualification for severance benefits under the provisions of the J&J Severance Plan. Respondents point to the broad discretion conferred to the Pension Committee to apply and interpret the terms of the severance plan. Br. at 5-8, Br.16

Respondents claim extensively here, as in the lower courts, that Subsections 4.1 (a) (iv), 4.1 (b) (viii) and 5.1 (d), granting the Pension Committee "sole discretion" or "absolute discretion", could legally be used to disqualify Petitioners and prospective class members from severance benefits in the absence of any of ADEA's affirmative defenses. The lower Courts have erroneously agreed, Br. at 10-12, App.15, App.30.

Subsection 4.1(b)(ii) of the Plan, disqualifies a pension eligible individual for severance benefits when a normal or voluntary retirement occurs. That same subsection mandates that a pension eligible individual who is eliminated be paid severance. See subsection 4.1(b)(ii), App.49. Here the Plan's terms are direct and come from OWBPA. It is the incorporation of these terms that causes the Plan to be in compliance with the OWBPA amendments. Thus, subsection

4.1(b)(ii) is not just an ERISA promise to pay severance benefits to pension eligible individuals who are eliminated, but mandates that those severance benefits be paid, 29 U.S.C. 623 (f)(2)(B)(i). The Plan's incorporation of the terms in Article 8.2 Controlling Law, requires the Pension Committee to always construe the Plan in compliance with applicable law, see App.57. Here an employer or an administrator may be granted wide discretion in interpreting and applying the terms in an ERISA benefit plan. That discretion does not include determining a matter of law contrary to ADEA, or in practice, contrary to terms that are mandated in the Plan, because in effect the plan is the law.

As noted, Respondents argued and the lower courts found, that "sole discretion" or "absolute discretion" reserved in an ERISA plan required the "arbitrary and capricious" standard to apply. Therefore the Pension Committee's "absolute discretion" would control the level of severance benefits paid to a pension eligible individual. This analysis contravenes the ADEA, as amended by OWBPA and is erroneous as a matter of law.

V
A "MUTALLY EXCLUSIVE" DEFENSE AND A 29 U.S.C. §623 (*l*)(2)(A) "AFFIRMATIVE DEFENSE" ARE UNAVAILABLE TO RESPONDENTS IN THIS CASE

In their Brief in Opposition, Respondents state that Petitioners were not eligible for severance benefits because they "elected to retire under the enhanced benefit program", Br. at 2. Respondents seek to perpetuate before this Court a false dichotomy between vested severance rights as a result of Petitioners' terminations and their VEREP "elections" rights.

The "enhanced benefit program" to which Respondents refer, is the voluntary early retirement incentive plan, VEREP. Respondents blatantly misrepresent in this Court, as in the lower courts, without plan or statutory citation, that the two benefits, VEREP and severance benefits, were conditioned as "mutually exclusive", one or the other, not both. **"Because**

they elected to retire under the enhanced benefit program, Petitioners were not eligible to also receive severance benefits,....." Br. at 2. (emphasis added)

In the Appendix submitted to this Court, Petitioners have included both plans in their entirety, the VEREP at App.66-73 and Severance Plan at App.44-58. Petitioners have included the ADEA statutes that are controlling of each plan. Severance Plan, 29 U.S.C. 623 (f)(2)(B)(i). Voluntary early retirement incentive plan, 29 U.S.C. 623 (f)(2)(B)(ii), App.132-133. In the Brief in Opposition, Respondents cite to neither plan nor statute that supports a "mutually exclusive" defense, Petition at 15-17.

The 3rd Circuit Court of Appeals' erroneous conclusions arise out of this false dichotomy, and Respondents' citation of May v. Shuttle, Inc., 129 F.3d 165 (DC Cir. 1997) below, Br. 11, 12, 13 & 14, Petition at 16-17. In May the enhanced pension benefits and the severance benefits were made available solely as a result of the same contingent event unrelated to age, see e.g., 29 U.S.C. §623 (*l*)(2)(A)(ii), App.134. In May the qualification for either benefit was termination, Petition at 16, 21-22. Where a voluntary early retirement incentive plan applies, termination is a prohibition not a qualification.

"Even if it were necessary to reach the OWBPA affirmative defenses .....ADEA specifically allows the offset of severance benefits by the value of retiree health insurance benefits. 29 U.S.C. §623 (*l*)(2)(A)." Br.15, (emphasis added).

Respondents **can not assert** a 29 U.S.C. §623 (*l*)(2)(A) affirmative defense in this case because: 1) it is not incorporated into either Plan; 2) VEREP is age-related; and 3) it would have been illegal to have done so because a 29 U.S.C. §623 (*l*)(2)(A) affirmative defense requires a termination as a qualification which is a prohibition in a 29 U.S.C. 623 (f)(2)(B)(ii) affirmative defense. Petition at 16, 21-22.

A " mutually exclusive" and a 29 U.S.C. §623 (*l*)(2)(A) "affirmative defense" are unavailable to Respondents for Petitioners' ERISA , ERISA CLASS and ADEA Claims in this

case. See Appendix Supplement, Counts 1, 2 and 3, Apps.152-165. See also Petition at 24.

VI

THE RIGHT TO VEREP VESTED INDEPENDENTLY OF THE RIGHT TO VESTED SEVERANCE BENEFITS

The 3rd Circuit Court of Appeals erroneously concluded that vested severance benefits were not deducted from vested pension benefits in this case, Br.9, App.14. This error is based on Respondents' false dichotomy, and misapplication of May, cited *supra* .

Respondents, once again, seek to perpetuate an erroneous conclusion in this Court. **"Petitioners also were given an additional choice not available to younger employees:.....to receive VEREP's enhanced benefits- to which they had no pre-existing right or entitlement,"** Br.13, (emphasis added).

No pre-existing right or entitlement existed for any VEREP individual until their individual window period of eligibility opened. That right was vested until the window closed. Once closed, the right expired, Petition at 7.

It is completely disingenuous for Respondents to suggest here that: 1) VEREP was not a vested right, 2) somehow VEREP was "gifted" to Petitioners, and 3) VEREP was made available as a result of position eliminations, as in May.

"The dispositive point remains that no petitioner or other employee, younger or older was required to choose between vested pension and severance pay", Br. at 14, (emphasis added). Respondents here, blatantly ignore Petitioners' Hobson's Choice, Petition at 7-9, and perpetuate the erroneous conclusion still further.

All VEREP individuals, including VEREP *eliminated* individuals, had earned the vested right to VEREP retirements because they met the eligibility requirements, Petition at 7.

Severance eligibility for VEREP *eliminated* individuals was created when they were eliminated under the same terms and conditions as the *others* that were eliminated, 623 (a) (1) and 623 (a) (2). Respondents provided severance benefits to *others* and in so doing created the same severance eligibility rights for VEREP *eliminated* individuals, Petition at 7-9.

In a " privilege of employment case", it is irrelevant that the employer had no obligation to provide the benefit. Once an employer decides to grant an opportunity to some, "it may not deny this opportunity to others because of their age." DiBiase v. Smithkline Beecham Corp., 48 F.3d 719, 725 (3D Cir.1995) quoting Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (emphasis added).

A "right" to an employee benefit is "vested" when, as a matter of law, it can not be taken away. The VEREP and severance benefits are "vested" rights, because in this case they arise from independent events that can not be taken away as a matter of law. That is exactly the "Hobson's Choice" that is in this case, Petition at 9.

VII
VEREP's "SERVICE BENEFIT" AND SEVERANCE BENEFITS ARE NOT FUNGIBLE

Respondents blatantly misrepresent here, as in the lower courts, without plan or statutory citation, that the "Service Benefit", is the same thing as a severance benefit. The 3rd Circuit Court of Appeals erroneously concluded that the "Service Benefit" is the same thing as a severance benefit, 3rd Op.11, App.10-11.

Respondents perpetuate that misconception in this Court. **"..... a Service Benefit (equal to Severance Plan Benefits).. "** Br. at 13. **"...were similar in nature and amount"**, Br. at 8. **"The Service Benefit was equal to the benefit provided under the Severance Plan....."** Br. at 4. **"These benefits included the Service Benefit, which benefit alone was equal to Severance Plan benefits"**, Br. at 5. (emphasis added).

The Service Benefit is a pension benefit for two reasons, 1) it is only available with VEREP retirements, and 2) its characteristics as predetermined and so set in the plan by the employer, are that of a pension benefit. Petition at 6.

Pension benefits are not a substitute for severance pay, Equal Employment Opportunity Commission v. Westinghouse Electric Corp. ("Westinghouse II"), 869 F.2d 710 3d Cir.

1989); vacated and remanded for reconsideration under "Betts".

VEREP's vested "Service Benefit" and vested severance benefits are not fungible.

VIII
RESPONDENTS USED A SUBTERFUGE IN RECKLESS DISREGARD OF ADEA's PURPOSES AND PROTECTIONS

In this case, Respondents: 1) disregarded the terms of subsection 4.1(b)(ii) and Article 8.2 Controlling Law that mandated that severance benefits be paid to pension eligible individuals when eliminated; 2) disregarded that an option to remain employed was mandated in implementing VEREP; 3) disregarded that severance liability was created because of position eliminations; and 4) integrated a corporate wide policy scheme that denied severance benefits to a class of pension eligible employees by compelling them to retire. This policy scheme effectively avoided the corporation's liability, and deprived a class of pension eligible individuals of their severance benefits, to which they were entitled as a matter of law. Petition at 25-28. See also, App.99 at ¶8.

Respondents' policy scheme also integrated two statutory violations of ADEA, 29 U.S.C.§ 623 (f)(2)(B)(i), CFR §1625.10 (a)(2), App.139 and 29 U.S.C.§ 623 (f)(2)(B)(ii), CFR §1625.10 (d)(7), App.142.

In addition, Respondents' Brief in Opposition fails to refute the merits of the Petitioners' arguments.

This is the essence of Petitioners' Question 5.

IX
AGE RELATED EMPLOYEE BENEFIT CLAIMS ARE SERIOUS POLICY ISSUES THAT MUST BE ADDRESSED BY THE SUPREME COURT OF THE UNITED STATES

Respondents' actions left Petitioners and prospective class members with a Hobson's Choice. VEREP *eliminated* individuals were compelled to forego their severance rights to

secure pension benefits for themselves, their spouses and other dependants who would be deprived of the continuation of lifetime of medical, life insurance and other dependent coverage. VEREP, compelled their "choice".

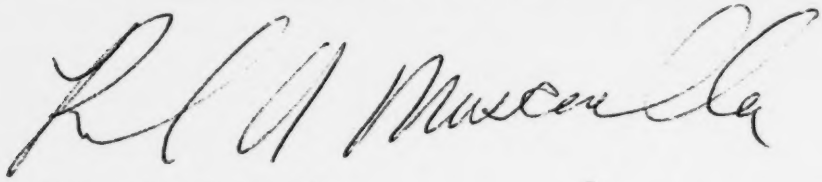
Petitioners present five Questions, collectively constituting an issue of first impression, which seriously affect the pension and benefit rights of pension eligible individuals. This class of American workers, a large and growing population, is the primary target in corporate downsizing. If eliminated, they face the possibility of using their retirement savings, rather than severance benefits, for living expenses. It is very unlikely that any would have the financial resources to pursue a legitimate benefit claim, while unemployed, against a corporate colossus brandishing vast persuasive power and limitless financial resources.

A major purpose of the OWBPA amendments enacted by Congress was to protect pension eligible individuals from just the types of egregious acts and the fundamental violations that are present in this case. Congress enacted into law the standards that must be followed, "equal benefit or equal cost" and the "affirmative defense", 29 U.S.C.§ 623 (f)(2)(B), and in so doing could not have sent a clearer warning to employers: do not deny severance benefits based on pension eligibility or receipt of pension benefits.

An employer's large-scale implementation of a corporate wide policy scheme that compels retirements and denies severance benefits to pension eligible individuals requires close scrutiny and examination by this Court in light of OWBPA's express mandates. Just as this Court definitively laid to rest the issue of ADEA waivers under Title II of OWBPA in Oubre v. Entergy Operations, Inc., 118 S. Ct. 838 (1998), so Petitioners submit the time has come to do the same with respect to the issues presented here under Title I. It is respectively urged that this Court definitively articulate the full force and effect of the protections afforded to older workers by OWBPA, and give guidance to the lower Courts faced with these issues of law.

Petitioners pray that *certiorari* is granted for all Questions.

Respectfully submitted by each named petitioner *pro se* ,



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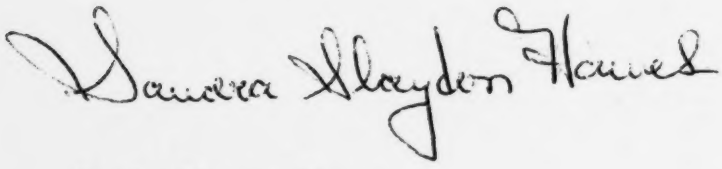

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Dated: [illegible] 05 2008